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Supreme Court, U.S.
FILED

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NO._____

SUPREME COURT OF THE UNITED STATES
October Term, 2000

JOHN F. KILGROE,

Petitioner,

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHORE AND WAREHOUSE UNION AND LOCAL 13 OF THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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12 pp

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Court of Appeals had the duty and the power to consider Petitioners motion to vacate its mandate and grant a rehearing under *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1943) 322 U.S. 238, 88 L.Ed 1250, 64 S.Ct. 997

(2) Whether a Bivens remedy or relief under F. R. Civ. P., Rule 60 (b) should be implied for alleged due process violations in the dispositions of appeals by unpublished memorandum

(3) Request for summary disposition with instructions to consider Plaintiff's motion on the merits.

Other issues that may be considered if a hearing is granted:

(4) May an employer and a union covered by the National Labor Relations Act maintain one seniority system for children of deceased union members and a less favorable seniority system for others, including Petitioner.

(5) May petitioner compel compliance with a cease and desist order previously enforced by the Ninth Circuit in an action for breach of contract 29 U.S.C. 185 and the Unions statutory duty of fair representation. (The NLRB did nothing and we need some remedy to compel compliance with Court orders.)

(6) Is a claim for being wrongfully terminated in retaliation for filing a federal law suit in violation of California Labor Code, Section 6310 (a), (1) preempted by the National Labor Relations Act.

THE PARTIES

The parties are Plaintiff, Appellant and Petitioner John F. Kilgroe, Defendants/Appellees and Respondents, the Pacific Maritime Association, ("the employer"), the International Longshore and Warehouse Union ("ILWU") and Local 13 of the ILWU ("Local 13") (collectively the "Union").

PETITION FOR WRIT OF CERTIORARI

MEMORANDUMS AND ORDERS BELOW

The two orders, all unpublished, are from the Court of Appeals for the Ninth Circuit case of Kilgroe v. Pacific Maritime Association, et al. 98-55240, Appendices A and B.[1]

JURISDICTION IN THIS COURT

This action attacks the mandate of the Ninth Circuit Court of Appeals. It was therefore correctly filed in the Ninth Circuit Court of Appeals, See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238, L.Ed 1250, 64 S.Ct. 997. On April 6, 2001, the panel issued its, "will not be accepted" order. Appendix B. This Petition for Certiorari is being filed within ninety days of the April 6, 2001, order which is timely (28 U.S.C., §2101 (c), (g) and Supreme Court Rules, Rule 13 (1) and (3). The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The Order of April 6, 2001, Appendix B is a final order because: The motion to vacate mandate is a new action filed in the court of appeals, See Hazel-Atlas, supra, and the order of April 6, 2001 terminates that action. Since the Order of April 6, 2001, terminates a new action it is appealable under 28 U.S.C. § 1254(1) and the Supreme court Rules, Rules 13(1) and (3). Further, on or about April 18, 2001, Petitioner filed a motion to vacate the order of April 6, 2001 but the clerks at the Ninth Circuit will not process this or any other document Petitioner files. Nor will Petitioner receive a

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[1] A prior Writ of Certiorari from the Memorandum of February 10, 2000, 00-251, was denied on or about October 12, 2000.

new order. The order to vacate the order of April 6, 2001 will just sit in the file. Contact Howard Ham supervising civil clerk at the Ninth Circuit.

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment V. due process clause: "No person shall be. . . deprived of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

On or about March 26, 2001, Petitioner filed in the Ninth Circuit a motion to vacate mandate on the grounds of (1)fraud upon the court, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1943) 322 U.S. 238, 88 L. Ed 1250, 64 S.Ct. 997; Judicial inadvertence or judicial error and fraud, F. R. Civ. P., Rule (1) and (3), and Violation of the Due Process Clause of the V Amendment of the U. S. Constitution, *Bivens* v. Six Unknown Named agents 403 U.S. 388, 29 L Ed 2d 619, 91 S.Ct. 1999 (1971). On or about March 26, 2001, the Circuit, I am told, entered a computer entry order stating "send to panel" On April 6, 2001 the Panel issued an order, appendix B stating in part, " As per the Order of May 16, 2000 (appendix A) appellant's Motion to Vacate mandate and Grant a rehearing. . . . Will Not be accepted in this closed case."

REASONS FOR GRANTING THE WRIT

(1) WHETHER THE COURT OF APPEAL HAD THE DUTY AND THE POWER TO CONSIDER PETITIONER'S MOTION TO VACATE ITS MANDATE AND GRANT A REHEARING UNDER *Hazel-Atlas Glass Co. v. Hartford-Empire*

Co. 322 U.S. 238(1943).

This Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238, 66 L.Ed 1250, 64 S.Ct. 997 at page 249-250 held:

> "We hold, therefore, that the Circuit Court on the record here presented had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions."

The Ninth Circuit Panel, therefore abused its appellate court discretion when it issued its order, appendix B, that Petitioners motion "would not be accepted in this closed case." The motion should have been considered on the merits. The panel should have at least shown curiosity in whether it was carrying out a fraud by defendants. The Ninth Circuit offered no reason for its inability to reopen the file or create a new file.

(2) WHETHER A BIVENS REMEDY OR RELIEF UNDER F. R. Civ. P., Rule 60 (b) SHOULD BE IMPLIED FOR ALLEGED DUE PROCESS VIOLATIONS TO THE DISPOSITION OF APPEALS BY UNPUBLISHED MEMORANDUM.

There is a current brake down in the appellant process known to the Supreme Court. I have seen Justices Kennedy and Souter Comment on the problem on national television, in a program on voting for judges and the Texas judiciary. I have read of Justice O'Connor addressing the Ninth Circuit in an annual conference in Idaho, saying that the Ninth Circuit will have to correct its judicial errors, implying that the Supreme Court will not correct common judicial errors. At

the same time the Ninth Circuit believes that correcting errors is not the purpose of hearings en banc. If the opinion is unpublished, there is no necessity for the panel to adhere to the record or the law. That leaves the panels unsupervised. Which is why we have developed one law for published opinions and a second law or no law at all for unpublished opinions.

In *Schweiker v. Chilicky* (1988) 487 U.S. 412, 101 L. Ed.2d 370, 108 S.Ct. 2460, This Court considered a break-down in the handling of Social Security appeals, that was remedied by congress and held that remedies under *Bivens* were unavailable where congress has provided for a comprehensive remedy. Here Petitioner was denied relief under both F. R. Civ. P., Rule 60 (b) and *Bivens*. If Petitioner is entitled to relief under Rule 60 (b) he does not contend that he is entitled to a *Bivens* remedy. But Petition contends that he is entitled to relief under *Bivens* if relief under F. R. Civ. P., Rule 60 (b) is unavailable.

In *Schweiker* there was a deterioration in the handling of Social Security benefits with ALJs correcting many of the errors. In this case there is a deterioration the handling of appeals by unpublished memorandum and no one is correcting the errors. There are may errors in the court of appeals, that, if the disposition is unpublished, are not readily remedied by a Petition for rehearing, rehearing en banc and Petition for writ of Certiorari. We need a remedy for arbitrary unpublished dispositions, short of filing a *Bivens* lawsuit. Please see that this matter is heard on the merits either in the Supreme Court or in the Circuit Court.

(3) REQUEST FOR SUMMARY DISPOSITION WITH INSTRUCTIONS

If a hearing can not be granted in this case, please

grant summary disposition with instructions to consider Plaintiff's motion to vacate mandate on the merits. Petitioner should not have to convene the Supreme Court just because a panel will not consider a motion on the merits that the Supreme Court said should be so considered in *Hazel-Atlas, Supra.*

CONCLUSION

For the above reasons the writ of Certiorari should be granted.

July 3, 2001

Respectfully submitted.

JOHN F. KILGROE

Petitioner

APPENDIX A

Filed May 16, 2000
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN F. KILGROE, Plaintiff-Appellant, v. PACIFIC MARITIME ASSOCIATION; INTERNATIONAL LONGSHOREMAN'S AND WAREHOUSEMAN'S UNION; Local 13, of International Longshore and Warehouse Union, Defendants-Appellees.	)	) No. 98-55240) D.C. No. CV) -96-04423-) WDK) **ORDER**

Before: BROWNING, TASHIMA, Circuit Judges, and JONES, District Judge[1]

The Panel as constituted above has voted to deny the petition for rehearing. Judges Browning and Tashima voted

[1] Honorable Robert E. Jones, United States District Judge for the district of Oregon, sitting by designation.

to deny the petition for rehearing en banc, and Judge Jones so recommended.

No active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and Petition for rehearing en banc are denied. No further filings will be accepted in this closed case.

APPENDIX B

Filed APR 6, 2001
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN F. KILGROE,	)
	) No. 98-55240
Plaintiff-Appellant,	)
	) D.C. No. CV-
v.	) 96-04423-
	) WDK
PACIFIC MARITIME ASSOCIATION;	)
INTERNATIONAL LONGSHOREMAN'S	) **ORDER**
AND WAREHOUSEMAN'S UNION;	)
Local 13, of International Longshore	)
and Warehouse Union,	)
	)
Defendants-Appellees.	)
	)

Before: BROWNING, TASHIMA, Circuit Judges, and JONES, District Judge[1]

As per the order of May 16, 2000, appellant's Motion

[1] Honorable Robert E. Jones, United States District Judge for the district of Oregon, sitting by designation

to Vacate Mandate and Grant a Rehearing, Petition for Rehearing and Petitioner for Rehearing en Banc, and Petition for Writ 28 U.S.C. 1651, FRAP, RULE 21 to Vacate Memorandum and Disqualify Panel for Failure to Attempt to Make Good Faith Effort to Apply Law of Jurisdiction to Record Before the Court will not be accepted in this closed case.